

**BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA**

In the Matter of:

SHANE H.,

Claimant,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. L2006020711

**DECISION**

The hearing in the above-captioned matter was held on April 13, 2006, at Culver City, California. Joseph D. Montoya, Administrative Law Judge (ALJ), presided. Claimant Shane H. was represented by his mother, J.H.<sup>1</sup> The Service Agency was represented by Lisa Basiri, (Basiri) Fair Hearing Coordinator.

Evidence was received, argument presented, and the matter submitted for decision on the hearing date. Thereafter, the ALJ ordered that the record be reopened and that the Service Agency provide copies of Individual Program Plan documents. Claimant was afforded an opportunity to respond to any documents produced by the Service Agency in response to the order.

The Service Agency complied with the order in a timely manner, producing two documents. There was no objection or other response by the Claimant. Therefore, the Individual Program Plan (IPP) for October 2004 is received as Exhibit 6, and the IPP document for July 2005 is received as Exhibit 7.<sup>2</sup>

The matter was re-submitted as of May 12, 2006. The Administrative Law Judge hereby makes his factual findings, legal conclusions, and orders, as follows.

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<sup>1</sup> The surname of Claimant and his family is omitted to protect his privacy.

<sup>2</sup> The Service Agency's exhibits were numbered. Claimant prepared an evidence packet of some ten pages, which were not separated or paginated. At the hearing that packet was paginated, and references herein to particular parts shall be to the page number within Claimant's exhibit packet.

## **ISSUES PRESENTED**

Must the Service Agency pay for the entire program of Intensive Behavioral Intervention (IBI) services where the local school district has offered to pay for at least a part of those services? Second, has Claimant been entitled to continued provision of the entire package of services under the “aid-paid pending” rule?

## **FACTUAL FINDINGS**

1. Claimant Shane S. (Claimant) is a boy of nearly five years who suffers from autism. As a result of that condition, he is entitled to services from Westside Regional Center (Service Agency), pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500, et seq.<sup>3</sup> There is no dispute that he is eligible for services in the general sense; the dispute at hand centers on what sort of services should be provided to him by the Service Agency.

2. As detailed further below, Claimant instituted this proceeding by filing a request for hearing on or about February 6, 2006, in response to a notice from the Service Agency that it was reducing his IBI funding. There is no dispute that jurisdiction to proceed was established.

3. Claimant has a long relationship with the Service Agency, in that he was receiving services under the “Early Start” program, the common name for the California Early Intervention Service Act, Government Code section 95000, et seq, prior to his third birthday. Essentially, that program provides services for eligible children until they are three years old. After that, if eligible, a child may receive special education services from the schools, and/or services under the Lanterman Act.

4. Claimant’s Early Intervention services included occupational therapy for one hour per week, speech therapy for two hours per week, and “center-based programming at Smart Start,” three days per week, three hours per day. (Ex. 6, p. 4.) His first IPP pertaining to Lanterman Act services took place in October 2004. Under that plan, Claimant was to seek services from his school district, the Los Angeles Unified School District (LAUSD). (*Id.*, p. 5, 6.) However, that IPP also provided that the Service Agency would provide intensive behavioral intervention 10 hours per week from October 1, 2004 until the end of January, 2005. (*Id.*, p. 6.)

5. In June 2005, Claimant was assessed to determine if behavior therapy would be appropriate for him. The assessment was performed by Behavior Frontiers, a vendor of services to the Service Agency. A 15-page report was issued by Helen Mader on behalf of the vendor, and in that report she recommended that a behavioral intervention program be

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<sup>3</sup> All further statutory citations shall be to the Welfare and Institutions Code, unless otherwise noted.

instituted for Claimant, and that he receive 40 hours of one-to-one behavior therapy in his home, and that further services be provided for supervision and team coordination. (See Ex. 5, pp. 14-15.) The assessment report also recommended that beginning in the fall of 2005, Claimant should attend a preschool with typical peers and an aide for 12 hours, and that he should continue at that time to receive 28 hours per week of one-to-one therapy in his home. (*Ibid.*) The date of the report is not clear, though the copy received in evidence show a fax transmission banner at the top with a date of July 14, 2005.

6. On July 12, 2005, another IPP meeting was held. The IPP document does not reference the assessment or report by Behavior Frontiers. The IPP does state that the school district was providing an hour a week of occupational therapy, and that the family was paying for an hour per week of speech therapy. It also states that the Individual Education Program (IEP) planning meeting had not been held in October 2004 as scheduled. (Ex. 7, p. 5.) The Service Agency agreed to assist the family in the IEP process with their school.

7. Although the IPP from July 2005 does not reference the provision of IBI services, such services were funded by the Service Agency beginning on August 1, 2005. The services to be provided were for 40 hours per week, and were authorized until September 30, 2005. The parties anticipated that the amount of services provided by the Service Agency would decrease because the school district would provide at least some of the services. A subsequent progress report issued by the behavioral service provider on September 16, 2005, recommended that the 40-hour per week schedule be maintained.

8. In October 2005 Service Agency was informed that LAUSD had offered 10 hours per week of behavioral services. That offer was declined by Claimant's parents. A dispute arose between Claimant's parents and the Service Agency about the continued funding of the IBI services, and a fair hearing request was filed by Claimant<sup>4</sup>. The 2005 proceeding was settled with an agreement that the Service Agency would continue funding 40 hours per week of intensive behavior therapy, through January 31, 2006. The agreement was made at an informal hearing held on November 15, 2005.

9. On November 22, 2005, Ms. Basiri wrote Claimant's parents. Her letter, page 7 of exhibit 1, summarized the issues and the discussions from the informal hearing, and set forth the following statement of how the matter had been resolved:

Since our meeting, I discussed your request with Westside Regional Center's Autism Resource and Behavior Specialist, Soryl Markowitz. I am aware that you have also been in contact with Ms. Markowitz, and that she is planning to attend the IEP meeting with you scheduled for 12/07/05 at 1:30 p.m. at Nora Sterry. ***For this reason we have agreed that Westside Regional Center will continue to fund 40 hours per week of behavior intervention services for [Claimant] through Behavior***

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<sup>4</sup> The exact date of that filing is not disclosed in the record. That proceeding will be referred to as "the 2005 proceeding."

*Frontiers from 12/1/05 through 1/31/06.* In anticipation of the outcome of the IEP meeting, it is expected that the number of direct service hours provided by Westside Regional Center will be decreased to 20-25 hours per week as well as half of the supervision hours beginning 2/1/06.

(Emphasis in original.)

10. The remainder of Ms. Basiri's letter made clear that if this program was not acceptable to Claimant, he could proceed to a fair hearing. Mrs. H. did not object, but instead executed a Notice of Resolution form, and transmitted it to the Service Agency. Although the form itself was not produced in this case, a cover letter written by Mrs. H. was received in evidence. The letter states, in pertinent part:

I am herewith returning the Notification of Resolution form that you are referring [to] in the mentioned letter, signed in agreement as to what was discussed . . . on November 14, 2005.

I agree with Westside Regional Center's proposal to continue to fund 40 hours per week of behavior intervention services for my son (through Behavior Frontier until January 31, 2006). . . . We will do our utmost to secure services for the academic part of Shane's program through the Los Angeles Unified School District (LAUSD). However, I am herewith requesting that you send us a 30 day official prior written notice of the reduction of services as proposed in the above mentioned letter (anticipated as of February 1, 2006). . . . Should LAUSD not comply with our request to fund services we would like to have the option to appeal Westside Regional Center's reduction of hours of behavior intervention for my son.

(Claimant's exhibits, p. 5.)

There is no evidence that the Service Agency agreed to a thirty day notice as requested.

11. As contemplated in the November 22 letter, Ms. Markowitz attended two IEP meetings with the parents and the school district representatives, both meetings taking place in December 2005. The LAUSD continued to offer only 10 hours per week of behavioral intervention. The Service Agency encouraged the family to either accept that amount, or to file for a due process hearing against the LAUSD.

12. By mid-January 2006, the Claimant's family had not resolved their differences with LAUSD. On January 18, 2006, Claimant's family requested that the Service Agency continue to fund 40 hours per week of the behavior therapy, through April 30, 2006. On

January 30, 2006, the Service Agency gave written notice that the request was denied. (See Ex. 1, p. 3.) Claimant filed a request for a fair hearing on February 6, 2006; that document was received by the Service Agency no later than February 9, 2006. (Ex. 1, p. 1.)<sup>5</sup>

13. Since February 1, 2006, the Service Agency has funded only 30 hours per week of behavior therapy. Behavior Frontiers continues to provide that service. As of the hearing date in this matter, a due process proceeding was underway between Claimant and LAUSD, but the matter had not been resolved. Mrs. H. attested that offers had been made by the school district at a mediation conducted shortly before this fair hearing, but issues other than the amount of behavioral interventions had not been resolved.

14. Since February 1, 2006, Claimant's family has been paying approximately \$1,000 per month for the 10 hours of behavioral therapy that is no longer provided by the Service Agency. There is no contention, or evidence, that the 40 hours of IBI services are not necessary for Claimant to meet his goals, nor is there any claim that the services are not cost-effective.

### **LEGAL CONCLUSIONS**

1. Jurisdiction was established to proceed in this matter, pursuant to section 4710 et seq., based on Factual Findings 1 and 2.

2. Services are to be provided in conformity with the IPP, per section 4646, subdivision (d). Consumer choice is to play a part in the construction of the IPP. Where the parties can not agree on the terms and conditions of the IPP, a Fair Hearing may, in essence, establish such terms. (See § 4710.5, subd. (a).)

3. The services to be provided to any consumer must be individually suited to meet the unique needs of the individual client in question, and within the bounds of the law each client's particular needs must be met. (See, *e.g.*, §§ 4500.5, subd. (d), 4501, 4502, 4502.1, 4640.7, subd. (a), 4646, subd. (a), 4646, subd. (b), 4648, subd. (a)(1) & (a)(2).) Otherwise, no IPP would have to be undertaken; the regional centers could simply provide the same services for all consumers. The Lanterman Act assigns a priority to maximizing the client's participation in the community. (Code §§ 4646.5, subd. (2); 4648, subd. (a)(1) & (a)(2).)

4. Section 4512, subdivision (b), of the Lanterman Act states in part:

‘Services and supports for person with developmental disabilities’ means specialized service and supports or special adaptations of generic services and support directed toward the alleviation of a developmental disability or toward the social, personal, physical, or

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<sup>5</sup> The document shows a “received” stamp and the date 21/9/06, with the initials “LB” thereat. It is inferred that the initials are those of Ms. Basiri.

economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. . . . The determination of which services and supports are necessary shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of . . . the consumer's family, and shall include consideration of . . . the effectiveness of each option of meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to, diagnosis, evaluation, treatment, personal care, day care, . . . speech therapy, . . . recreation, education, . . . behavior training and behavior modification programs, . . . camping, community integration services, . . . respite, . . .

5. Services provided must be cost effective (§ 4512, subd. (b)), and the Lanterman Act requires the regional centers to control costs as far as possible and to otherwise conserve resources that must be shared by many consumers. (See, e.g., §§ 4640.7, subd. (b), 4651, subd. (a), 4659, and 4697.) To be sure, the regional centers' obligations to other consumers are not controlling in the individual decision-making process, but a fair reading of the law is that a regional center is not required to meet a consumer's every possible need or desire, in part because it is obligated to meet the needs of many children and families.

6. Section 4715, subdivision (a), provides, in pertinent part:

Except as otherwise provided in this section, if a request for a hearing is postmarked or received by the service agency no later than 10 days after receipt of the notice of proposed action, . . . services that are being provided pursuant to a recipient's individual program plan shall be continued during the appeal procedure, . . .

Section 4715 goes on to define the circumstances that will terminate the provision of services after the request for hearing, such as a settlement of the case, but none of those circumstances are applicable in this case.

7. (A) The request for fair hearing was received within 10 days of the notice of proposed action, and thus under section 4715, the 40 hours of services should have continued. While the IPP was not formally amended after July 2005 to clearly delineate the provision of the behavioral intervention services, it is plain that the parties' agreements in August and November 2005 caused an amendment to the Claimant's IPP. Hence, the services in place under the IPP should have continued once the request for fair hearing was filed.

(B) Service Agency argues that under the agreement the services were to be reduced on a date certain, and that implicitly the previously-agreed upon reduction could not

be rescinded by filing a request to extend the services, and then to request a hearing. However, section 4715 must be given a broad reading in this case. That statute does not distinguish a case where the notice of action reduces or eliminates existing services from a case where services are not being provided, are requested, and the request is denied. In either event services then provided under the IPP must continue during the pendency of the hearing. Here the IPP, as modified by the parties' agreements, provided for 40 hours per week of services and such must continue.<sup>6</sup>

8. (A) The evidence establishes that Claimant needs 40 hours of IBI services per week, and there is no evidence that goals are not being reached, nor is there evidence that the services are not cost-effective. (Factual Finding 14.) Thus, the Service Agency should continue to fund such services.

(B) The Service Agency asserts that it can not provide such services where the school district should do so; essentially, it asserts that the services are a generic service and that under the law the school district should provide those services. To be sure, section 4648, subdivision (a)(8), provides that: "Regional center funds shall not be used to supplant the budget of any agency that has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services." However, that does not end the analysis.

(C) If a generic agency is required to provide services, but fails or refuses to do so, such services must be provided by the regional center, or it must make up any service shortfall; regional centers are known as the "payor of last resort." If the regional center believes the generic source, including a school district, has failed to meet its obligations, then it must provide the services, and it is authorized to pursue reimbursement under Code section 4659. As stated by the Attorney General in one of his opinions, "A regional center for persons with developmental disabilities may initiate an action at law for the purpose of pursuing a source of funding for clients receiving services." (73 Ops.Cal.Aty.Gen. 156, 157 (1990).)

(D) While it appears that the Claimant's family may not have pursued the school district with alacrity between October 2004 and August 2005, in recent months they have made efforts to obtain some of the services from LAUSD since at least the fall of 2005. The family availed themselves of the assistance offered by Ms. Markowitz for the December 2005 IEP meetings. A due process proceeding has been instituted. In these circumstances, it does not appear proper to release the Service Agency from its role of payor of last resort for services that are necessary to meet the child's developmental goals.

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<sup>6</sup> It appears that if the Service Agency's position were adhered to, then it might never have to give a thirty-day notice; artificially time-limiting services in the IPP agreements would arguably allow services to simply expire without notice. That does not appear to fall within the ambit of the Lanterman Act.

## **ORDER**

Claimant's appeal is sustained. The Service Agency, Westside Regional Center, shall resume funding of IBI services for Claimant at the rate of 40 hours per week, and as funded prior to January 30, 2006.

The Service Agency shall reimburse Claimant's family for those IBI services purchased by the Claimant's family since February 1, 2006, upon presentation of evidence of payment, such as cancelled checks, account statements, or receipts.

May 26, 2006

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Joseph D. Montoya  
Administrative Law Judge  
Office of Administrative Hearings

## **NOTICE**

THIS IS THE FINAL ADMINISTRATIVE DECISION IN THIS MATTER, AND BOTH PARTIES ARE BOUND BY IT. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN NINETY (90) DAYS OF THIS DECISION.